



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
SECOND APPEAL NO.417 OF 2023
WITH
CIVIL APPLICATION NO.9755 OF 2023**

1. Namdevrao S/o Shankarrao Pawade, (Deceased)
Age: 75 years, Occu: Nil.
 2. Anjanabai W/o Namdevrao Pawade,
Age: 65 years, Occu: Household,
 3. Govind S/o Namdevrao Pawade,
Age: 44 years, Occu: Private Service,
 4. Balaji S/o Namdevrao Pawade,
Age: 40 years, Occu: Private Service,
 5. Revatibai W/o Govind Pawade,
Age: 40 years, Occu: Household,
All above R/o Omkareshwar Nagar, Taroda (Kh.)
Tq. & Dist. Nanded. ..Appellants
(Orig. Defendants)
- Versus
1. Parvatibai W/o Dnyaneshwar Deshmukh
(Ingole) Age: 45 years, Occu: Finance Business,
R/o Vivek Nagar, nanded
Tq. & Dist. Nanded (Orig. Plaintiff)
 2. Nishikant S/o Yadav More,
Age: 22 years, Occu: Student (Orig. Defendant No.6)
 3. Naitik S/o Yadavrao More,
Age: 13 years, (Minor) (Orig. Defendant No.7)
No.3 U/g. Of his father
Yadavrao S/o. Marotrao More,
Age: 40 years, Occu: Agri.,
R/o. Sonkhed, Tq. Loha, Dist. Nanded ..Respondents

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Mr. U. B. Bilolikar, Advocate for Appellants.
Mr. G. D. Kale, Advocate for Respondent No.1.
Respondent Nos.2 and 3 are served.

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CORAM : S. G. CHAPALGAONKAR, J.

RESERVED ON : 12th FEBRUARY, 2025.
PRONOUNCED ON : 18th FEBRUARY, 2025.

ORDER:-

1. The appellants/original defendants take exception to the judgment and decree dated 29.04.2023 passed by District Judge-3, Nanded in Regular Civil Appeal No.112/2018, thereby upholding judgment and decree dated 28.02.2011 passed by Civil Judge Senior Division, Nanded in Regular Civil Suit No.370/2010. (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).

2. The respondent no.1/original plaintiff instituted Regular Civil Suit No.370/2010 seeking partition, separate possession and perpetual injunction in respect of land admeasuring 53R situated in Survey No.108/A at Wadi (Bk.), house plot no.48 situated at Omkareshwarnagar, Nanded and house situated at Wadi (Bk.). It was contention of plaintiff that defendant nos.1 and 2 are her parents, defendant nos.3 and 4 are her real brothers, defendant nos.6 and 7 are minor sons of sister and defendant no.5 is wife of defendant no.3. According to plaintiff, she alongwith defendants forms a joint family. The joint family possessed ancestral property, which is part of Survey Nos.78/D, 101/D and 108/A alongwith suit houses and plots. The plaintiff and defendants agreed to partition ancestral properties and executed memorandum of partition dated 07.11.2008 in presence of witnesses. It was agreed that house properties shall be kept for residence of defendant nos.1 to 4 and

plaintiff alongwith defendant nos.6 and 7 would get cash amount equivalent to their share in house properties. The defendant no.1 had executed a document in favour of plaintiff giving her 1/5th share in agriculture land. However, defendant no.1 failed to act upon agreed terms of partition. On the other hand, defendant no.1 executed nominal and bogus sale deed no.4499 dated 02.07.2010 in favour of defendant no.5 for 27R land from Gut No.108/A.

3. The defendants failed to cause appearance in the suit. Eventually, they proceeded *ex-parte*. The Trial Court after appreciation of evidence as recorded by plaintiff, passed decree granting 1/5th share to plaintiff in the suit properties. The defendant nos.1 to 5 assailed the decree of the Trial Court in Regular Civil Appeal No.112/2018 contending that they were not given sufficient opportunity to contest the suit and sought remand of the matter to the Trial Court. It is their contention that after service of suit summons, plaintiff had assured to withdraw the suit. Believing her words, defendants do not contest the suit. They came to know about the decree only when they received notice of R.D. No.77/2011 filed by plaintiff for execution of impugned judgment and decree. The defendants endeavour to contend that house properties are self-acquired properties of defendant nos.3 and 5 and plaintiff is already given share in Gut No.78/D. As such, she has no right to seek partition. The Appellate Court considered

aforesaid contentions and concluded that there is no justification for non-appearance of defendants before the Trial Court. The Appellate Court also observed that Appeal has been filed after seven years of filing of execution proceeding. Consequently, dismissed the Appeal.

4. Mr. Bilolikar, learned Advocate appearing for the appellants submits that Appellate Court could have granted opportunity in favour of defendants to file written statement and prove their defence. However, he do not dispute that defendants were served with suit summons and they failed to appear before the Trial Court. The reason for non-appearance is not substantiated by leading plausible evidence or material. No particulars as to when plaintiff assured to withdraw the suit and in whose presence such assurance was given is not explained in Appeal memo. Apparently, some reason is sought to be made out to suppress intentional default of defendants for non-appearance in the suit. This Court do not find any reason to interfere in reasoning given by Appellate Court for not acceding to the request of defendants to remand the case.

5. Mr. Bilolikar further invites attention of this Court to the operative part of the judgment of the Trial Court and submits that landed property in Survey No.108/A to the extent of 53R only is owned by family. The plaintiff can get 1/5th share out of 53R only,

but from operative part of the order it can be observed that entire 53R land from Survey No.108/A is directed to be partitioned and put into possession of plaintiff.

6. To counter aforesaid submissions Mr. Kale, learned Advocate appearing for the respondent no.1/plaintiff submits that there is no dispute that portion of 53R land from Survey No.108/A is the joint family property and plaintiff's entitlement is only to the extent of 1/5th share and plaintiff is seeking partition and separate possession of the 1/5th share out of 53R land only from Survey No.108/A.

7. In view of the specific contentions made on behalf of plaintiff, there should not be any confusion that plaintiff's entitlement is only to the extent of 1/5th share out of 53R land from Survey No.108/A.

8. In that view of the matter, no substantial question of law arises for consideration in this Second Appeal. Second Appeal stands dismissed with aforesaid observations.

9. In view of dismissal of Second Appeal, nothing survives in the Civil Application and the same is accordingly disposed of.

(S. G. CHAPALGAONKAR)
JUDGE